IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MRS. JUSTICE K.HEMA

MONDAY, THE 17TH DECEMBER 2007 / 26TH AGRAHAYANA 1929

CRL.A.No. 1896 of 2004

SC.166/2002 OF ADDL.SESSIONS COURT, THODUPUZHA
.....

APPELLANT: ACCUSED:
----

1. PERUMAL S/O.VEERAPPAN, WARD NO.VII, H.NO.23, DEVIPATTANAM RAMASWAMY THERUVU, SIVAGIRI TALUK, THIRUNELVELI, TAMILNADU.

2. MUNIYANDI, S/O.MAHALINGAM, WARD NO.VII, H.NO.31, DEVIPATTANAM RAMASWAMY THERUVU, SIVAGIRI TALUK, THIRUNELVELI, TAMIL NADU.

BY ADV. SMT.SANGEETHA LAKSHMANA

RESPONDENTS: RESPONDENT:

STATE OF KERALA, REP. BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM (SESSIONS COURT THODUPUZHA, IN SESSION CASE NO.166/2002).

BY PUBLIC PROSECUTOR SRI. K.C. SANTHOSH KUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 17/12/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B.KOSHY & K.HEMA, JJ.

Crl.A.No.1896 OF 2004

Dated 17th December, 2007

JUDGMENT

Koshy,J.

Three persons (Adivasies) were charge-sheeted for the murder of one of the forest mazdoor watcher by name Ayyavu and for attempting to murder PW2, another forest mazdoor watcher, and for wrongfully detaining the deceased and PWs 2 and 3 and appellants (A2 and A3) were convicted for the offences punishable under Sections 341, 302 and 307 read with section 34 of the Indian Penal Code . The prosecution case is that accused came to gather hill produces from the forest, Ezhanikudy of Thekady Forest area. The deceased and PWs 2 and 3 are Forest watchers employed on a temporary basis and they are cousins (sons of sisters). While they were doing duty on 13.11.1998, they saw a shed in the forest. There was nobody in the shed. Therefore, they waited to see as to who are occupying the shed. At about 8.30 p.m. the accused came there. Accused made fire for cooking food and in that light they identified the accused. The deceased and PWs 2 and 3 surrounded them. Then a scuffle took place and accused pushed them. PWs 2 and 3 fell down and rolled over the rock towards the bottom of the rock. When they got up and again reached the place, they saw A1 cutting Ayyavu. They also stated that while A2 and A3 were wrongfully

restraining the deceased, seeing PWs 2 and 3 coming there A1 also inflicted a stab injury on PW2, but, PW2 prevented it with the torch. Therefore, he sustained injury only on the right hand. Thereafter, they were able to caught hold of A2 and A3 and they had tied the hands of A2 and A3 and took the injured Ayyavu and accused. He also identified MO4 knife used by A1 for inflicting injuries. They were brought to the forest office and the matter was informed by wireless to PW1, the Assistant Wild Life Forest Preservation Officer. PW1 gave Ext.P1 F.I. Statement on the basis of which F.I.R was registered and the F.I.R reached the police station on the next day. Police station was also 17 kms. away from the place of incident. A1 died on 6.4.2000, before starting of trial. Therefore, A2 and A3 faced trial.

2. PW1 proved Ext.P1. PWs 2 and 3 deposed in accordance with the prosecution case. The ante-mortem injuries recorded in the postmortem certificate are as follows:

> "**Injury (Ante-mortem)**
>
> Cut wound 21 x 11 x 6.5cm nearly horizontal on the back of neck. His right end was 5cm below the mastoid process. The margins showed slight abrasions and bruising. The depth of the wound was same throughout. Muscles. Vessels and other tissues were seen severed. The third cervical vertebra and corresponding part of the spinal cord were seen cut and separated

> completely except for an attachment with few bony tissues of the vertebra at its front aspect."

The doctor certified that death was due to the above wounds. There was only one cut injury. The postmortem report clearly proves that Ayyavu died due to the cut injury. According to the prosecution, it was inflicted by A1. But, A1 did not face trial as he died before starting of trial. In the 313 statement A2, who is none other than the father of A1, stated that police came in search of A1 to his house and he stated that he is not aware of his movements. Then he was arrested telling that till A1 is arrested, he will be under custody. According to A3, who is a neighbour of A1, police came to his house and asked him to show A1 and police took him to a shop where A1 usually visits. But, A1 was not found there. Thereafter he was caught by the police and stated that he will be released only after A1 is found. A1 was arrested only after six months of the incident when he was caught red handed by Tamil Nadu police in another case and on the basis of the production warrant he was produced in court. Defence plea of A2 and A3 in their statement under section 313 are unacceptable because first they were apprehended by PWs 2and 3 and brought to the forest office and apprehended by the police and their presence at the place of incident cannot be disputed. Then the

question is from the evidence available what is the offence they have committed. There is ample evidence in this case to show that PWs 2 and 3 as well as the deceased surrounded A1 to A3 in the shed set up by them in the forest. They were under fear and they wanted to escape. Then there was a scuffle and PWs2 and 3 fell down. By the time they got up A1 has stabbed the deceased and when PWs 2 and 3 were trying to catch hold of A2 and A3, they persuaded. It is pertinent to note that PW2 admitted that he was also having a knife with him. There is no evidence to show whether deceased as well as PW3 had knife with them. Anyway, they were forest guards and accused apprehended danger and they restrained the forest guards. There is no case for the prosecution that A2 and A3 were having knife or any other weapon with them and there is no evidence to show that they shared any common intention to kill the deceased. In a bid to escape, they caught hold of deceased, PWs 2 and 3. Meanwhile, A1 inflicted injury on the deceased and also tried to inflict injury on PW2. We are of the opinion that since there is no evidence to show that A2 and A3 shared common intention of murdering the deceased, they cannot be convicted under Section 302 of the Indian Penal Code. It is the case of PWs 2 and 3 that it is only A1 who stabbed the deceased as well as PW2. Therefore, it cannot be stated that A2 and A3 can be convicted under section 307 IPC also. At the maximum in bid to

escape they pushed down PWs 2 and 3 and restrained the deceased, PW2 and PW3. The evidence would show that A2 and A3 pushed them down and thereafter they were wrongfully restrained the deceased Ayyavu and for that sentence under section 341 IPC was already undergone by them.

3. In the above circumstances, we set aside the conviction and sentence of A2 and A3 (Appellants in this case) under sections 307 and 302 read with Section 34 of the Indian Penal Code and they should be released from custody forthwith, if they are not required for any other case.

The appeal is allowed.

J.B.KOSHY
JUDGE

K.HEMA
JUDGE

tks